## A. The Relevant Upstream and Downstream Markets for Assessing the Merger's Likely Effects

39. Before assessing Comcast's market power, one must first define the relevant markets that are implicated by the proposed transaction. As the Commission correctly observed in the Hughes-News Corporation proceeding, "there is no need to engage in a rigorous market definition in order to analyze the potential anticompetitive effects of the transaction."[48] The reason is that market definition is useful in making inferences about anticompetitive effects based on (indirect) evidence of high market shares and entry barriers; when other, more direct methods are available for examining anticompetitive effects, such as extant exclusionary strategies by the acquiring firm, market definition is not critical. For completeness, however, I proceed to define the relevant product and geographic markets.

### 1. The Relevant Downstream Market

40. Multi-channel video programming distribution (MVPD) service is the relevant downstream product market. A variety of government entities, from the Federal Communications Commission (FCC) to thé Department of Justice (DOJ) to the Government Accountability Office (GAO), have concluded that, in addition to other smaller suppliers, cable television providers and DBS satellite television providers directly compete with each other in the supply of MVPD services. MVPD service distributed by these and other providers is "reasonably interchangeable," and thus meets the antitrust interpretation of a properly defined product market.[49] The market is generally defined with regard to demand substitution, which focuses on

48. *See General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Dkt. No. 03-124, Memorandum Opinion and Order (released Jan. 14, 2004) [hereinafter *Hughes-News Corp. MO&O*], ¶ 61.

49. MVPD services, such as those offered by wireline cable and DBS, are substitutable. *See* In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Dkt. No. 06-189, Thirteenth Annual Report, released Jan. 16, 2009 [hereinafter *Thirteenth Annual MVPD Report*], ¶ 5, 6. *See also* In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214

buyers' views of which products are substitutes. Numerous government and non-governmental studies indicate that the presence of cable overbuilders or DBS providers constrain the price charged by incumbent cable television operators. To borrow just one example, the FCC found in its 2009 video competition report that MVPD service can be provided by satellite or by cable networks.[50] Following FCC and DOJ precedent, I define the relevant downstream product market as all MVPD service.

41. Although it is too new to likely constrain the price of cable television service, online video service is properly viewed as part of the MVPD market; the Internet is a platform that competes with other platforms (DBS, cable plant, fiber plant) in the delivery of video service to end users. As mentioned earlier, over the course of 2009, the average amount of time spent watching videos online more than doubled, from 356 minutes per month (5.9 hours per month) to 763 minutes per month (12.7 hours per month). Indeed, in its thirteenth annual video competition report, released in January 2009, the FCC considered "web-based Internet video" to be an entrant in the MVPD market.[51] In that proceeding, Comcast commented that Internet video applications compete with cable television for the time and attention of viewers.[52] Comcast also observed that video web sites drew users in numbers comparable to the subscriber reach of cable and satellite companies.[53] Specifically, Comcast noted that "Many networks have jumped head-first into Internet video, providing consumers with an interactive *alternative* to traditional TV-set

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Authorizations, CS Dkt. No. 98-178, Memorandum Opinion and Order, released February 18, 1999, FCC 99-24, ¶ 21.

50. *Thirteenth Annual MVPD Report*, ¶ 3 ("The marketplace for the delivery of video programming services is served by a number of operators using a wide range of distribution technologies. [...] Specifically, we examine the cable television industry and other established multichannel video programming distributors ("MVPDs"), including direct broadcast satellite ("DBS") providers, home satellite dishes ("HSD"), and broadband service providers ("BSPs"), as well as broadcast television licensees. We also examine other wireline video providers, including local exchange carriers ("LECs"), which have initiated commercial services using copper-based, fiber, and hybrid-fiber coaxial cable distribution technologies for video programming; open video systems ("OVS"); and electric and gas utilities.").

51. *Id.* ¶¶ 150-63.

52. *Id.* ¶ 153 (citing Comcast Comments at 30, 34, 57-59; Comcast Reply at 20).

53. *Id.* ¶ 154 (citing Comcast Comments at 30).

viewing."[54] Based on its review of the Internet landscape, Comcast predicted that "video delivered over the Internet is here to stay."[55] Although its economic experts now argue that Internet video is a *complement* to cable television,[56] in November 2006—before it sought to acquire NBCU's Internet properties—Comcast argued the opposite: "All of these modalities of communications are important to younger consumers, all are part of the paradigm shift to a 'what-you-want-when-you-want-it' world, and *all of them compete* with traditional and not-so-traditional video distribution technologies for time, attention, and dollars."[57] Comcast cannot have it both ways.

### 2. The Relevant Upstream Markets

42. Because the proposed transaction would enable Comcast to engage in a host of anticompetitive strategies, the relevant upstream markets must be defined with reference to a particular type of conduct. The common denominator across all of the strategies, however, would be to lessen competition in the MVPD market.

#### a. Denial of Regional Sports Programming

43. Regional sports programming is generally defined as the right to carry televised professional regional sports events.[58] Because fans generally follow their local team, regional sports programming is not reasonably interchangeable with national sports programming (for example, the NCAA men's basketball tournament); nor is it interchangeable with another market's regional sports programming because a local subscriber's taste for programming of a

54. Comcast Comments at 29-30 (emphasis added).

55. *Id.* at 37.

56. *See Israel & Katz Online Video, supra*, at 24 ("Consumers use online viewing to supplement traditional television viewing.").

57. Comcast Comments at 59 (emphasis added).

58. *See General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Dkt. No. 03-124, Memorandum Opinion and Order (released Jan. 14, 2004) [hereinafter *Hughes-News Corp. MO&O*], ¶ 133 ("The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: RSNs typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game.").

*local* regional sports franchise cannot be satisfied by substituting programming of a *distant* regional sports franchise.[59]

44. The FCC has recognized that denial of access to regional sports programming can have important competitive implications in the provision of MVPD service (the downstream market).[60] Specifically, the FCC has recognized regional sports programming as a "must have" input to the production of MPVD service. Moreover, as the FCC explained in its *Adelphia Order*, "an MVPD's ability to gain access to RSNs and the price and other terms [or] conditions of access can be important factors in its ability to compete with [downstream MVPD] rivals."[61] The FCC noted that Time Warner and Comcast "acknowledge that an MVPD that drops local sports programming risks subscriber defections."[62] The FCC concluded that "lack of access to RSN programming can decrease an MVPD's market share significantly."[63]

45. The FCC's findings on the pivotal role of RSN access are supported by academic research. Wise and Duwadi (2005) find that limited competitive access to regional sports programming reduces DBS penetration and permits incumbent cable firms to demand inflated

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59. *Id.*

60. *See, e.g., FCC Adelphia Order*, *supra*, at ¶ 68 ("In contrast, with respect to regional sports networks ("RSNs") and other regional networks, we conclude, as we did in the *Comcast-AT&T* and *News Corp.-Hughes* transactions, that the relevant geographic market is regional."). *Id.* at ¶ 67 ("Nothing in the record suggests a need for us to define rigorously all possible relevant product markets for video programming networks. For purposes of our analysis, we will separate the video programming products by Comcast and Time Warner into two broad categories: (1) national cable programming networks and (2) regional cable networks, *particularly regional sports networks*.") (emphasis added).

61. *Id.* ¶ 124 ("Hence, an MPVD's ability to gain access to RSNs and the price and other terms of conditions of access can be important factors in its ability to compete with rivals.").

62. *Id.* ("Applicants acknowledge that an MVPD that drops local sports programming risks subscriber defections and that MVPDs 'will drive hard bargains to buy, acquire, defend or exploit regional sports programming rights.'").

63. *Id.* ¶ 145 ("Lack of access to RSN programming can decrease an MVPD's market share significantly. The Applicants [Time Warner and Comcast] have argued that DirecTV's and EchoStar's lack of access to CSN Philadelphia has not had a significant impact on DBS market share in Philadelphia and that DirecTV's estimates of the effect are fatally flawed. We disagree.").

cable prices.[64] According to their econometric model, DBS penetration is lower in markets where cable operators carry regional sports channels.[65] This effect, they believe, is explained by the fact that cable operators sometimes discriminate against DBS providers in the provision of regional sports content.[66] The authors provide three ways that incumbent cable providers can impair DBS competition: (1) by denying DBS competitors access to cable-affiliated regional sports programming; (2) by denying DBS access to unaffiliated regional sports content through exclusive contracts; or (3) by setting the terms of carriage so that DBS competitors find it "uneconomical" to carry affiliated or unaffiliated regional sports programming.[67]

#### b. Denial of Local Broadcast Programming

46. The FCC has also recognized that local broadcast television programming constitute a relevant product market. In its order approving News Corporation's acquisition of DirecTV, the FCC separated video programming into "three broad categories: (1) national and non-sports regional cable programming networks; (2) regional sports cable networks; and (3) local broadcast television programming."[68] The FCC found "substantial evidence in the record that a temporary withdrawal of regional sports programming networks *and local broadcast*

64. Andrew Wise & Kiran Duwadi, *Competition between Cable Television and Direct Broadcast Satellite—The Importance of Switching Costs and Regional Sports Networks*, 4 J. COMP. LAW & ECON. 679-705 (2005) [hereinafter *Wise & Duwadi*].

65. *Id.* at 702 ("We also find that DBS penetration is lower where cable operators carry regional sports channels. This is probably due to a combination of the factors discussed above. Two of the factors may involve cable operators limiting DBS operator access to regional sports networks.").

66. *Id.* ("We also find that DBS penetration is lower where cable operators carry regional sports channels. This is probably due to a combination of the factors discussed above. Two of the factors may involve cable operators limiting DBS operator access to regional sports networks. If this is true, cable operators may be able to offset competitive pressures from DBS, and thus may be able to impose larger price increases without losing subscribers to DBS where they are able to transmit vertically integrated regional sports networks terrestrially, or are able to reach exclusive carriage agreements with non-vertically integrated regional sports networks.").

67. *Id.* at 700 ("We, therefore, can think of three circumstances that may be contributing to reduced DBS penetration where cable operators carry regional sports networks. First, cable operators may be reducing DBS penetration by making unavailable to DBS providers affiliated regional sports networks transmitted terrestrially. Second, cable operators may be able to make unavailable to DBS providers non-vertically integrated regional sports networks, which are not covered by FCC program access rules, by signing exclusive carriage agreements. Third, the terms of the carriage agreements for some regional sports networks, either affiliated or unaffiliated with cable operators, may make them uneconomical for DBS providers to carry.").

68. *Hughes-News Corp. MO&O* ¶ 60.

*television* station signals would cause a significant number of customers to shift from their current MVPD",[69] implying that local broadcast programming is another "must-have" input. It also found that local broadcast station programming is "highly valued by consumers, and entry into the broadcast station market is difficult."[70] DBS providers need access to local broadcast stations to compete effectively with incumbent cable operators. In its 2002 annual video competition report, the FCC found that DBS penetration had increased more rapidly in markets where local-into-local service was available.[71]

### c. Denial of National Sports Programming

47. National sports programming constitutes another relevant product market.[72] Current suppliers of national sports cable networks include the family of ESPN networks, Golf Channel, Versus, MLB Network, NBA TV, NHL Channel, Fox Soccer Channel, Fox College Sports, Tennis Channel, CBS College Sports, GolTV, Speed Channel, and Horseracing Television. The FCC has found regional sports networks to be a separate product from national sports networks.[73] The next closest substitute to national sports programming would be national non-sports programming. But for the vast majority of viewers of national sports programming, especially live-event coverage, generic national cable programming (whether it is a sit-com, a news show, or a drama) would be an unacceptable substitute. For the same reason that the regional sports networks are considered to be distinct from regional non-sports networks, national sports networks should be considered distinct from national non-sports networks. The only difference between the two is that an RSN carries sports with a local interest only (for example, a regular season game of the Washington Wizards), whereas the national sports

69. *Id.* ¶ 87 (emphasis added).
70. *Id.* ¶ 201.
71. *See 2002 Video Competition Report*, 17 FCC Rcd 26901, 26931-32 ¶ 61 (2002).
72. It bears noting that Comcast's economists distinguish sports programming from non-sports programming when assessing network profitability. *See Israel & Katz Online Video, supra*, ¶ 11.
73. *Hughes-News Corp. MO&O* ¶ 60.

network carries sports with a national interest (for example, the Masters or Tour de France or Wimbledon).

### d. Denial of Online Video Programming

48. Online video programming represents another relevant upstream market.[74] Major suppliers of online video programming include Hulu.com, CBS Interactive, Fox Interactive Media, and YouTube.com. Online video is currently viewed via computers, handheld devices, and televisions. Several cable networks, such as Tennis Channel or ESPN, replicate a portion of their programming on websites. Downloadable movies on websites like Netflix.com are also properly considered online video programming. By the end of 2009, the average online viewer watched over nearly 13 hours per month of online video.

49. Recent developments in software and hardware are making it easier to view online video via television, and OTT video providers are designing businesses around that viewing method. Online video is sufficiently distinct from other types of online content, such as news, email, and search to constitute its own product market. In particular, OTT video providers that seek to assemble a portfolio of online *video* content would not perceive other types of online content to be reasonable substitutes for online video. Moreover, consumers of OTT video services would not be as likely to use their televisions to access email or perform Internet searches, as those features typically require a keyboard and thus function more effectively on a computer.

50. As is the case for cable network programming, some types of online video may be considered "must-have" video content in the sense that, if denied to an OTT video provider or a rival Internet service provider, the rival would be significantly impaired in its ability to compete

74. It bears noting that Comcast's economists, Drs. Katz and Israel, analyze the proposed transaction's likely effects on the provision of "long-form, professional-quality video programming" via the Internet, which is largely consistent with my proposed market definition. *See Israel & Katz Online Video, supra*, ¶ 4.

effectively in the supply of online video service. According to comScore, the two most popular online video sites in February 2010 were YouTube.com and Hulu.com.[75] With 912.5 million videos viewed in February 2010, Hulu.com was second behind YouTube among all online video properties. Because the average length of a Hulu.com video (for example, an episode of *Modern Family*) exceeds the average length of a YouTube.com video (for example, a cat flushing a toilet), this commonly used metric of ranking online video properties (by videos downloaded) vastly understates the importance of Hulu.com. Other online video programming may not be considered "must-have" on a standalone basis, but when combined with other types of online programming, the resulting combination of programming may constitute a "must-have" input for OTT video providers.

### 2. The Relevant Geographic Markets

51. The relevant geographic market also depends on the nature of the exclusionary conduct under consideration.

#### a. Denial of Local Broadcast Programming or Regional Sports Programming

52. The relevant geographic market for analyzing the prospect of denial of a local NBC affiliate or an RSN is the local level. When analyzing the competitive effects of withholding Comcast-affiliated local programming, it is important to consider the interdependence between upstream (input) markets and the downstream market (MVPD services). Although the consistency of MVPD offerings (typically one cable operator and two DBS providers) remains constant beyond the confines of a DMA, the demand for video programming—especially with respect to regional sports programming—varies by geography.

75. comScore Releases February 2010 U.S. Online Video Rankings, *available at* http://www.comscore.com/Press_Events/Press_Releases/2010/4/comScore_Releases_February_2010_U.S._Online_Video_Rankings.

Because a vertically integrated cable operator like Comcast that controlled regional sports or local broadcast programming in one region could not affect competitive outcomes by withholding that content from MVPDs in another region, the relevant geographic market is defined by the geographic boundary of the demand for said programming, which typically coincides with a DMA. Accordingly, for analyzing this type of conduct, the geographic market should be defined as the DMA.

53. A DMA-wide geographic market definition has also been widely adopted by other parties that have analyzed the MVPD and regional sports programming markets. For example, the FCC has conducted market analyses at the DMA level. In the *Adelphia Order*, the FCC explained that DMAs are the appropriate market "to examine the geographic area in which consumers are likely to place a similar value on the RSN programming at issue and to examine the transactions' impact in areas where viewers are likely to receive the same RSN programming."[76] For this reason, the FCC concluded "we find it reasonable to define the relevant geographic market for the analysis of harms concerning access to RSNs as any DMA that is home to a sports team."[77] This geographic market definition is consistent with the FCC's analysis in the *Hughes—News Corp.* proceeding.[78] In the same proceeding, the FCC also

76. *FCC Adelphia Order, supra*, ¶ 126 ("Using the DMA allows us here, as we did in *News Corp.-Hughes,* to examine the geographic area in which consumers are likely to place a similar value on the RSN programming at issue and to examine the transactions' impact in areas where viewers are likely to receive the same RSN programming.").

77. *Id.* ¶ 125 ("Because individual DMAs usually are entirely encompassed within the authorized viewing zone for a team's games and contain those fans that value its programming most highly, we find it reasonable to define the relevant geographic market for the analysis of harms concerning access to RSNs as any DMA that is home to a sports team.").

78. *Hughes-News Corp. MO&O*, ¶ 66 ("In contrast, with respect to RSNs, we conclude, as we did in the Comcast-AT&T merger, that the relevant geographic market for RSNs is regional. In general, contracts between sports teams and RSNs limit the distribution of the content to a specific "distribution footprint," usually the area in which there is significant demand for the specific teams whose games are being transmitted. MVPD subscribers outside the footprint thus are unable to view many of the sporting events that are among the most popular programming offered by RSNs. We thus find it reasonable to define the relevant geographic market as the "distribution footprint" established by the owner of the programming.").

concluded that "in the case of broadcast television programming, it is reasonable to use DMAs to define the relevant geographic market for each individual broadcast station."[79]

54. The relevant DMAs to analyze here are the eleven local markets in which Comcast owns a RSN plus the ten local markets in which Comcast will acquire an O&O NBC local affiliate. As it turns out, there is significant overlap between those two areas. As of the release of the last Video Competition Report, Comcast owned eleven RSNs: SportsNet Bay Area, SportsNet California, SportsNet Chicago, SportsNet Mid-Atlantic, SportsNet New England, SportsNet Northwest, SportsNet Philadelphia, Sports SouthWest, Comcast/Charter Sports Southeast, SportsNet New York, and Mountain West SportsNet.[80] NBCU owns and operates ten local television stations that broadcast NBC Television Network programming in the following markets: New York; Los Angeles; Chicago; Philadelphia; Dallas-Ft. Worth; San Francisco; Washington, D.C.; Miami-Ft. Lauderdale; San Diego; and Hartford-New Haven.[81] It bears noting that Comcast does not own marquee regional sports programming in each DMA in which it owns an RSN. For example, in the Baltimore DMA, the exclusive content on Comcast SportsNet Mid-Atlantic (Washington Wizards basketball and Washington Capitals hockey) is not likely considered to be "must-have" programming. Indeed, in recognition of this possibility, Comcast has recently rebranded (sometime after 2009) Comcast SportsNet Mid-Atlantic to Comcast SportsNet Washington.[82]

**b. Denial of National Sports Programming**

55. As in the case of regional sports programming, the relevant geographic market is defined by the geographic boundary of the demand for national sports programming, which is the

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79. *Id.* ¶ 65.
80. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,
81. Merger Application, at 29.
82. Comcast SportsNet Washington, *available at* http://en.wikipedia.org/wiki/Comcast_SportsNet_Washington ("formerly called Comcast SportsNet Mid-Atlantic (2001-2009)").

nation. National sports networks are generally licensed to MVPDs nationwide. And the demand for national sports programming does not vary significantly by geography. A vertically integrated cable operator in a given region that controlled marquee national sports programming could impair competition by withholding that content from MVPDs in another region. Accordingly, for analyzing this type of conduct, the geographic market should be defined as the nation.

#### c. Denial of Online Video Programming

56. The relevant geographic market to analyze the competitive effects of a denial of online video programming to an OTT video provider or to a rival ISP is the nation. Online video programming is available to Internet subscribers nationwide, and the demand for such content does not vary significantly by geography. A vertically integrated cable operator in a given region that controlled marquee online video programming could impair competition by withholding that content from OTT video providers or ISPs in another region. Accordingly, for analyzing this type of conduct, the geographic market should be defined as the nation.

### B. Measures of Comcast's Market Power in the Supply of MVPD Service and in the Purchase of Video Programming

57. Market power is defined as the ability to raise prices above competitive levels or to exclude rivals. Market power can be proven directly, through evidence of power over price,[83] or indirectly, through high market shares in a relevant product market combined with evidence of

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83. Comcast's monthly per subscriber cable television margins of {{[redacted]}} are certainly consistent with the notion of significant power over price. *Israel & Katz Online Video, supra*, at ¶ 104. Economists consider division-specific profit margins, as opposed to firm-wide accounting profits, as evidence of market power. *See e.g.*, Kevin Kreitzman, Melanie Williams, Michael A. Williams, & William Havens, *Estimating Monopoly Power with Economic Profits*, UC DAVIS BUSINESS LAW JOURNAL (forthcoming 2010) (showing that the degree of a firm's market power in a given market is embodied in its cash flows and can be measured by its economic profits and economic rate of return). The {{$[redacted]}} in monthly video margin per subscriber is equal to {{$[redacted]}} in monthly revenue per subscriber less {{$[redacted]}} in monthly variable costs. The traditional Lerner index, a measure of the deviation of prices from variables costs, for Comcast's markup is {{[redacted]}} percent. If Comcast's cable video service were perfectly competitively supplied, the monthly price would be {{$[redacted]}}. Comcast's ability to charge nearly {{[redacted]}} that amount indicates significant power over price.

barriers to entry. In economic parlance, a firm with market power faces a downward-sloping residual demand curve, which means that the firm can unilaterally affect the supply of goods in the market by increasing or decreasing output and can, as a result, generate monopoly profits by raising prices and reducing output.[84]

### 1. Market Shares

58. Comcast is the largest MVPD provider in United States. The relevant geographic market over which to assess Comcast's market power in the supply of and demand for national sports programming or online video programming is the nation. With nearly 24 million basic cable subscribers by the third quarter of 2009,[85] Comcast provides cable television service to approximately one quarter of all MVPD subscribers in the country.[86]

59. To the extent that Comcast coordinates its purchasing and supply decisions for national sports programming and online video programming with other cable operators, Comcast's "foreclosure share" exceeds its nationwide MVPD market share. The foreclosure share is the percentage of a market that can be foreclosed to rivals. There are five independent types of evidence that suggest that Comcast is in fact coordinating its strategy vis-à-vis video programming, including online video programming, with out-of-region cable operators.

- During the trial between Comcast and the NFL, former NFL Commission Paul Tagliabue testified that not only did Brian Roberts threaten to re-tier NFL Network if the NFL did not supply the Thursday night and Saturday night games on an exclusive

84. CARLTON & PERLOFF, *supra*, at 200 ("If a firm faces a downward-sloping demand curve, it has market power. [...] If consumers view brands in an industry as imperfect substitutes, a firm may raise its price above that of its rivals without losing all its customers."). *Id.* at 642 ("A firm (or group of firms acting together) has market power if it is profitably able to charge a price above that which would prevail under competition, which is usually taken to be marginal cost.").

85. Comcast Reports Third Quarter 2009 Results, Nov. 4, 2009, at 3.

86. According to the most recent data available from the Commission, there were nearly 96 million MVPD subscribers nationwide in 2006. *Thirteenth Annual Report*, at Appendix B Table B-1.

basis to Versus, but that the larger "cable industry" would support Comcast's refusal to deal.[87]

- Comcast, Cox, and Time Warner coordinate their strategies vis-à-vis national movie studios such as DreamWorks SKG, Universal, and Columbia TriStar via iN DEMAND's pay-per-view ("PPV") service. PPV programming on iN DEMAND includes "movies, boxing and mixed martial arts events and the digital out-of-market subscription professional sports packages for MLB, the NBA, the NHL and MLS," as well as "first-run movies and serves as the exclusive TV home of Howard Stern via its Howard TV On Demand offering."[88]

- TV Everywhere's authentication service, which facilitates the coordination of strategies vis-à-vis national video content providers and OTT video services, was jointly conceived by Comcast and Time Warner.[89] Time Warner recognized that the key to TV Everywhere's success was persuading the rest of the cable industry to join up; in the absence of coordination, viewers could substitute to websites that did not require a cable subscription.[90]

- Empirical research indicates that vertically integrated cable operators coordinated their carriage decisions with respect to independent programming.[91] Kang's econometric model produced empirical results that "make credible an underlying premise of a 30 percent national market share limit that the Federal Communication Commission established in 1993: namely, *that MSOs may tacitly collude in their carriage decisions*, having the effect of restricting market access to startup cable networks in which those MSOs have no ownership interest."[92]

- A U.S. district court recently certified a class of Philadelphia-based Comcast cable subscribers, who allege that Comcast entered into a series of swaps with other (out-of-region) cable operators so that each provider would have exclusive "clusters" of markets in violation of sections 1 and 2 of the Sherman Antitrust Act.[93]

To use a simple example, to the extent that Comcast and Time Warner coordinate in their refusal to carry independent national sports networks or to threaten cable networks or movie studios that

87. *See* Transcript of Record, NFL Enterprises LLC v. Comcast Cable Communications LLC, File No. CSR-7876-P, Apr. 16, 2009, 1277: 10-1279:10 (Paul Tagliabue testimony describing Comcast CEO Brian Roberts' suggestion that the NFL's relationship with the "cable industry" would not be "positive" on a going-forward basis.)

88. About inDEMAND, *available at* http://www.indemand.com/about/.

89. *See, e.g.*, Anthony Crupi, *TW, Comcast Prep 'TV Everywhere' Push*, ADWEEK, June 24, 2009, available at http://www.adweek.com/aw/content_display/news/media/e3i048f01beefa084a367ab3330d9e79e95 ("Time Warner today said it has partnered with Comcast to develop a cohesive strategy for its "TV Everywhere" initiative, which looks to reinforce the subscription TV model by allowing subscribers to access cable network programming on-demand, via broadband and mobile platforms.").

90. *See, e.g., Revenge of the Cable Guys, supra.*

91. *See* Jun-Seok Kang, Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study, Indiana University Working Paper, August 30, 2005.

92. *Id.* at 1.

93. *See Behrend v. Comcast Corp.*, 2010 U.S. Dist. LEXIS 1049 (E.D. Pa. Jan. 7, 2010).

post their content online, then the foreclosure share increases from approximately 25 to 37 percent (equal to Comcast's 25 percent share plus Time Warner's 12 percent share[94]); if the coordination involves the entire "cable industry," as intimated by Brian Roberts in his conversations with Paul Tagliabue, then the foreclosure share increases to over 60 percent.[95] Even if Comcast is not coordinating with other cable operators, Comcast's share of national MVPD subscribers (25 percent) is sufficiently large to create a presumption of anticompetitive effects under the antitrust laws.[96]

60. The relevant geographic market over which to assess Comcast's market power in the supply of regional sports programming is the DMA in which Comcast owns an RSN. Similarly, the relevant geographic market over which to assess Comcast's market power in the supply of local broadcast programming is the DMA in which NBCU owns an NBC broadcast network. As it turns out, Comcast is the dominant MVPD provider in the *majority* of the DMAs in which NBCU owns and operates an NBC affiliate. For example, Comcast serves approximately 70 percent of MVPD subscribers in the Philadelphia DMA, and it serves approximately 60 percent of MVPD subscribers in the Chicago, Miami, and San Francisco DMAs. In these and other DMAs, Comcast's market share is clearly above levels typically associated with monopoly power (assuming high barriers to entry). Table 1 shows Comcast's share in the ten DMAs in which NBCU owns and operates a local NBC broadcast network.

94. *Thirteenth Annual Report*, at Table B-3.

95. NCTA Industry Data, *available at* http://www.ncta.com/Statistics.aspx (showing 62.1 million cable subscribers as of December 2009).

96. *See* PHILLIP AREEDA, IX ANTITRUST LAW 375, 377, 387 (Aspen 1991) (indicating that 20 percent foreclosure is presumptively anticompetitive); *See also* HERBERT HOVENKAMP, XI ANTITRUST LAW 152, 160 (indicating that 20 percent foreclosure and an HHI of 1800 is presumptively anticompetitive).

TABLE 1: COMCAST'S MARKET SHARE FOR THE 10 DMAS IN WHICH NBCU OWNS AND OPERATES A LOCAL NBC AFFILIATE AS OF 2010

| | DMA | SNL Kagan* | Warren's** | TVB*** |
|---|---|---|---|---|
| 1 | Philadelphia, PA | 68.5% | 68.9% | 74.4% |
| 2 | Chicago, IL | 63.2% | n/a*** | 62.8% |
| 3 | Miami-Fort Lauderdale, FL | 61.2% | 50.9% | 67.7% |
| 4 | San Francisco-Oakland-San Jose CA | 59.3% | 73.4% | 68.5% |
| 5 | Washington, DC (Hagerstown, MD) | 48.0% | 44.7% | 71.1% |
| 6 | Hartford & New Haven, CT | 40.7% | 49.6% | 76.8% |
| 7 | New York, NY | 9.8% | 11.1% | n/a |
| 8 | Dallas-Fort Worth, TX | 0.0% | 0.0% | n/a |
| 9 | Los Angeles, CA | 0.0% | 0.0% | n/a |
| 10 | San Diego, CA | 0.0% | 0.0% | n/a |

*Notes and Sources*: Percentages represent Comcast share of "MVPD Subscribers," in late 2009. * SNL Kagan/MediaCensus Competitive Intelligence as of fourth quarter 2009. ** Comcast basic subscriber data available from Advanced TVFactbook, Warren's Communications News, May 2010. Data on DMA Cable/ADS penetration taken from TVB Local Cable Reach Guide Feb. 2010, Television Bureau of Advertising, *available at*: http://tvb.org/nav/build_frameset.aspx. *** Percentages represent Comcast share of "Local Market Interconnects" as a percentage of HHs reached by Cable/ADS. Data on DMA Cable/ADS penetration taken from TVB Local Cable Reach Guide Feb. 2010, Television Bureau of Advertising, *available at*: http://tvb.org/nav/build_frameset.aspx. *** Data for Chicago, IL DMA from the Advanced TVFactbook was incomplete. ^ Non-overlapping markets.

As Table 1 shows, Comcast serves over 40 percent of the market in six of the ten markets in which NBCU owns and operates an NBC affiliate according to the Television Bureau of Advertising.

## 2. Barriers to Entry

61. Because monopoly power is the ability to engage profitably in substantial and sustained supra-competitive pricing, a finding of high market shares with evidence of barriers to entry supports a conclusion of monopoly power. In the absence of such barriers, a price increase above the competitive level may invite entry sufficient to make that price increase unprofitable.

62. In any given MVPD market, entrants face significant barriers. One barrier to entry in the Philadelphia DMA has been a legal barrier—the franchise process. RCN spent more than two-and-a-half years attempting to obtain a franchise agreement from the City of Philadelphia and, tellingly, never received a franchise. Verizon also faced delays when it applied for a video

franchise in the City of Philadelphia.[97] Legal measures, such as patents and franchises, have been widely recognized by economists as significant barriers to entry.[98] Furthermore, as described below, these legal barriers to entry have been bolstered by Comcast's actual conduct in response to its competitors' attempts to gain local franchises.

63. Physical barriers to entry—in the form of large fixed costs—also exist in the MVPD market in the Philadelphia DMA. These fixed costs, which are incurred for any level of production, imply that the provision of MVPD services is characterized by economies of scale. As the American Bar Association explained in its treatise on antitrust in telecommunications markets:

> Economies of scale also play an important role in analyzing the ease of entry into the communications industry. Barriers to entry created by large capital outlays required in many segments of the industry also create strong economic incentives to build an economy of scale. As Judge Posner has noted, the costs of building a cable television grid—e.g., laying cable on all major streets—are both huge and 'invariant to the number of subscribers a system has.' Any operator must build the grid, and, once that is done, the cost of adding another subscriber by connecting the grid to his home is relatively small.[99]

Such economies of scale are generated by the fixed costs cable operators must incur to establish a cable system. In its *Thirteenth Annual Report* on MVPD competition, the FCC noted the substantial investments cable companies must make in their systems. For instance, cable operators report that they have invested over $100 billion to construct advanced two-way fiber optic networks,[100] which can cost from $100,000 to $300,000 per mile.[101] In addition, the FCC reports that cable companies indicate that they spent $10.6 billion on capital improvements in

97. *See* Bob Fernandez, *Politics, Comcast slow Verizon's pay-TV bid* (Philadelphia Inquirer, Dec. 14, 2008), *available at* http://www.philly.com/philly/business/36120899.html.

98. *See, e.g.*, CARLTON & PERLOFF at 77 (recognizing that "a good example of a long-run barrier to entry is a patent."). *See also* Ex Parte Submission of the Department of Justice, MB Docket No. 05-311, *available at* http://www.usdoj.gov/atr/public/comments/216098.htm.

99. *See* AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, TELECOM ANTITRUST HANDBOOK 97 (American Bar Association 2005).

100. *Thirteenth Annual MVPD Report, supra* at ¶52.

101. Jeremy Feiler, *RCN Out to Block Comcast*, PHILADELPHIA BUSINESS JOURNAL, Aug. 16, 2002 ("RCN's business is capital-intensive – installing fiber-optic or coaxial cable can cost $100,000 to $300,000 per mile – and it has halted its expansion.").

2005 and an estimated $11.1 billion in 2006.[102] These reported expenditures indicate that an entrant must undertake significant upfront investments in cable plant and facilities before entering the MVPD market.

### 3. Ability to Exclude Rivals

64. Pursuant to a nationwide strategy of clustering local cable franchises, Comcast assembled several clusters that allowed it to control entire DMAs, so that it could exercise monopoly power over customers and other critical inputs needed by rival MVPDs. Having done so, it was then economically and commercially feasible for Comcast to (a) require that its contractors not work for RCN (an overbuilder, or cable firm that "overbuilds" and seeks to compete for households already served by an incumbent MSO) as a condition of working for Comcast; and (b) require that the regional sports programmer (in which Comcast owned a controlling interest) not make its programming available for DirecTV and Dish Network. The ability to exclude rivals is another way to demonstrate market power. In this section, I review two means by which Comcast has thwarted entry by MVPD rivals.

#### a. Withholding Critical Local Inputs

65. Comcast has actively sought to deny its competitors—such as overbuilders like RCN and DBS providers like DirecTV and EchoStar—access to critical local inputs such as RSN programming and contractors.

##### i. Regional Sports Networks

66. The FCC has recognized Comcast's incentive to use its dominance in the upstream RSN market to impair competition in the downstream MVPD market. In assessing the potential anticompetitive effects of the joint acquisition of Adelphia by Time Warner and Comcast, the FCC found that the acquisition would increase the likelihood of harm to MVPDs in

102. *Thirteenth Annual MVPD Report, supra* at ¶52.

markets in which Time Warner or Comcast hold, or have the potential to hold, an ownership interest in an RSN.[103] The FCC also found that Time Warner and Comcast would gain an incentive and increased ability to deny carriage to unaffiliated RSNs.[104] The FCC concluded that even small increases in the market share of Comcast or Time Warner would increase the firm's incentives to increase prices for affiliated RSNs.[105] In particular, the FCC found that a uniform price increase was likely to occur in fifteen of the 39 "key" geographic markets known as DMAs.[106] The Commission also provided a recognized link between RSN ownership and MVPD competition. Specifically, the FCC noted that DBS penetration levels are significantly lower in Philadelphia, where DBS operators—such as DirecTV and Dish Network—cannot offer the local RSN to their subscribers.[107]

67. There appears to be a direct relationship between Comcast's share of households and instances where Comcast discriminates against DBS providers. Specifically, Comcast engages in discrimination against some unaffiliated MVPDs in *every* market in which (1) it owns the sort of marquee sports content to make such discrimination worthwhile and (2) it supplies cable service to at least 35 percent of the households within the DMA.[108] The 35 percent

103. *FCC Adelphia Order, supra* ¶116.

104. *Id.*

105. *Id.* ¶141.

106. *Id.* ¶144 ("Key DMAs are DMAs that are home to professional sports teams that play in one of the four major U.S. sports (football, baseball, basketball, and hockey). These DMAs are most likely to be within the "inner zone" of where sports programming is most popular. Therefore, these DMAs are the most susceptible to subscriber losses if the RSN is withheld. We find a potential for an increase in the RSN's affiliation fee of at least five percent in 15 of the 39 key DMAs. These DMAs are Atlanta, Boston, Buffalo, Charlotte, Cincinnati, Cleveland, Columbus, Dallas, Jacksonville, Los Angeles, Miami, Minneapolis, Pittsburgh, San Diego, and Washington. In these DMAs, a uniform price increase is likely to extract at least an additional $4.2 million per market in RSN fees from unaffiliated MVPDs under conservative assumptions in our model.").

107. *Id.* ¶146. In the cities where the local RSN is not available to DBS subscribers (Philadelphia, San Diego, and Charlotte), the FCC's regression analysis shows a statistically significant drop in market share in Philadelphia and San Diego. *Id.* ¶149. ("We find that the percentage of television households that subscribe to DBS service in Philadelphia is 40% below what would otherwise be expected given the characteristics of the market and the cable operators in the DMA.").

108. Hal J. Singer & J. Gregory Sidak, *Vertical Foreclosure in Video Programming Markets: Implication for Cable Operators*, 3 REV. NETWORK ECON. 348 (2007).

threshold may represent the critical share necessary to profitably own an RSN and withhold regional sports programming from competing MVPDs.

TABLE 2: TOP 30 LOCAL MARKETS IN WHICH COMCAST OWNS A RSN

| Market (DMA) | Affiliated RSN | Comcast Subs as % of Total Households in DMA (Before Adelphia Merger) | Comcast Subs as % of Total Households in DMA (After Adelphia Merger) | Does Comcast Own Marquee Sports Content? | Discriminate Against Unaffiliated MVPD |
|---|---|---|---|---|---|
| Orlando | Comcast/Charter Sports Southeast | 5 | 8 | No | NA |
| Tampa | Comcast/Charter Sports Southeast | 10 | 10 | No | NA |
| Atlanta | Comcast/Charter Sports Southeast; BravesVision | 29 | 32 | No | NA |
| Washington | SportsNet MidAtlantic | 28 | 38 | Yes | No |
| **Sacramento** | **SportsNet West** | **35** | **35** | **Yes** | Yes |
| Miami | Comcast/ Charter Sports Southeast | 37 | 42 | No | NA |
| **Philadelphia** | **SportsNet Philadelphia** | **58** | **60** | Yes | **Yes** |
| Baltimore | SportsNet MidAtlantic | 53 | 56 | No | NA |
| Detroit | Comcast Local | 48 | 48 | No | NA |
| **Chicago** | **SportsNet Chicago** | **49** | **49** | Yes | **Yes** |

*Note*: Reproduced from Singer and Sidak (2007).

Although the exact share of total households required to make discrimination vis-à-vis rival MVPDs profitable is difficult to ascertain, based on the pattern contained in Table 2, it is reasonable to infer that the "critical share" is somewhere between 28 percent (pre-merger Washington DMA) and 35 percent (pre-merger Sacramento DMA). Comcast does not own marquee sports content in six of these ten DMAs: Miami, Atlanta, Tampa, Orlando, Detroit, or Baltimore.[109] However, Comcast's experience in the other three DMAs (not counting Washington) in Table 2 demonstrates that Comcast would discriminate against DBS providers

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109. BravesVision carries some live Atlanta Braves baseball games in high-definition that are also carried on other RSNs (TBS and Turner South), although those RSNs do not carry the games in high-definition. *See* R. Thomas Umstead, *Comcast, Braves Create HD Net; Regional Could Serve as Template for Other Dedicated Team Channels*, MULTICHANNEL NEWS, Sept. 27, 2004, at 60; *BravesVision Suits Up for Season*, MULTICHANNEL NEWS, Apr. 1, 2005, at *1. Because these games are available on other RSNs not affiliated with Comcast, Atlanta is labeled "N/A" in Table 1. Even though neither RSN is carried by a DBS provider, Comcast's content on both BravesVision and CSS is not sufficient to be labeled "discrimination" because neither RSN carries *exclusive* marquis content.

once (1) Comcast secures the rights to marquee sports content and (2) establishes a sufficiently large downstream footprint.

68. Multiple econometric studies have estimated the decrease in DBS penetration in the Philadelphia DMA that can be attributed to Comcast's exclusionary conduct. For example, on behalf of DirecTV, Bamberger and Neumann estimate DBS penetration in each of the 210 DMAs throughout the country as a function of many demographic and economic characteristics of the DMAs.[110] Using this model, Bamberger and Neumann predict that, given its market characteristics, DBS penetration in Philadelphia should have been 20.9 percent in 2005 (rather than the actual 10.4 percent). The competitive effect of Comcast's refusal to provide CSN-Philadelphia was also documented by Robert Willig and Jonathan Orszag.[111] Like Bamberger and Neumann, Willig and Orszag estimate the extent to which Comcast's denial of CSN-Philadelphia reduced DBS penetration in Philadelphia. Willig and Orszag extended this foreclosure analysis by estimating the size of the incremental profits that Comcast extracted as a result of its RSN foreclosure strategy. Willig and Orszag calculated that Comcast's conduct caused Dish to win 190,000 fewer subscribers in the Philadelphia DMA than it would have otherwise. Bamberger and Neumann refined and updated these initial findings with a second study provided to the Commission in March 2006.[112] In both March 2005 and December 2005,

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110. Lexecon, Analysis of Effect of RSN Availability on DBS Penetration, at Appendix Table 1 (attached as Appendix A to Applications of Adelphia Communications Corp., Comcast Corp., and Time Warner Cable Inc. for Authority to Assign and/or Transfer Control of Various Licenses, MB Dkt. No. 05-192, DIRECTV Surreply, Oct. 12, 2005) [hereinafter *Lexecon October 2005 Analysis*].

111. *See* Redacted Letter from David K. Moskowitz, Executive Vice President and General Counsel, EchoStar Satellite L.L.C. to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 05-192 (filed Jan. 25, 2005) (*citing* the redacted Willig/Orszag study) [*hereinafter* Willig & Orszag].

112. Gustavo Bamberger and Lynette Neumann, Updated Analysis of Effect of RSN Availability on DBS Penetration, Mar. 17, 2006 (attached as Exhibit 1 to Letter from William M. Wiltshire et al., counsel to DIRECTV, to Marlene H. Dortsch, Secretary, FCC, Re: Ex Parte Presentation in MB Dkt. No. 05-192, Mar. 17, 2006) [hereinafter *Bamberger and Neumann March 2006 Analysis*].

their model estimates that the actual DBS penetration rate in Philadelphia is approximately 10 percentage points smaller than it should be based on Philadelphia's characteristics.

69. On behalf of Dish Network, Willig and Orszag calculate this number by "comparing its penetration in the Philadelphia DMA... to the average penetration in other DMAs where Echostar has local-into-local service (as in Philadelphia) but also carries professional sports."[113] Willig and Orszag noted that there were approximately 2.8 million MVPD subscribers in the Philadelphia DMA at that time, implying that Dish's penetration rate was reduced from 9.5 percent to 3 percent as a result of Comcast's conduct.[114] Note that this reduction does not estimate the *total* effect of Comcast's conduct on DBS penetration because it does not include the effect of Comcast's conduct on DirecTV's penetration rate. Willig and Orszag provided a supplementary analysis that includes both the extent to which Comcast's conduct reduced DBS penetration *and* the extent to which Comcast charged higher expanded basic cable rates as a result. Willig and Orszag explicitly link Comcast's refusal to provide its DBS rivals with CSN-Philadelphia to Comcast's exercise of market power by charging supra-competitive rates for its expanded basic cable service.

70. The FCC produced its own econometric study to examine whether DBS penetration was unusually low in Philadelphia.[115] Consistent with the DirecTV and Dish Network studies, the FCC's analysis indicated that, if DBS providers in Philadelphia had access to Comcast SportsNet, then DBS penetration would be approximately six percentage points

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113. *Id.* at 3 ("In Philadelphia, Comcast has been able to deny Echostar (and DIRECTV) access to the regional sports that it controls by transmitting the programming terrestrially to its own headends and thereby avoiding the exclusivity prohibition of the Communications Act. The result? Almost 190,000 subscribers lost. Echostar has estimated this loss by comparing its penetration in the Philadelphia DMA, which was extremely low at about 3% as of November 2003, to the average penetration in other DMAs where Echostar has local-into-local service (as in Philadelphia) but also carries professional sports – about 9.5% at the same point in time. The loss of about 70% of the expected penetration rate, applied to the Philadelphia DMA population of 2.8 million television households points to a loss of 188,000 subscribers.

114. *Id.*

115. *FCC Adelphia Order, supra.*

greater.[116] The FCC updated and revised its *Adelphia* regression analysis in the *2007 Program Access Order*. It again found that DBS penetration in Philadelphia was significantly below the predicted level and pointed to "empirical evidence that [Comcast's] withholding" of SportsNet programming from DBS providers in Philadelphia "has had a material adverse impact on competition in the video distribution market."[117]

71. Using the regression coefficients and the demographic and economic characteristics of Philadelphia, Singer and Sidak estimate that DBS penetration in the Philadelphia DMA should be 15.4 percent.[118] The 95 percent confidence interval around our best prediction is 13.1 to 17.8 percent. Because the actual DBS penetration rate in the Philadelphia DMA is outside the 95 percent confidence interval, one must reject the hypothesis that Philadelphia's predicted penetration rate is 9.4 percent. Stated differently, Philadelphia's low DBS penetration rate is less than what one would expect given its characteristics, which demonstrates that Comcast's foreclosure strategy has reduced the DBS penetration rate in the Philadelphia DMA.

### ii. Local Contractors

72. Comcast also sought to interfere with RCN's efforts to construct systems in the suburbs by limiting RCN's access to local contractors. According to an antitrust complaint filed on behalf of Comcast's subscribers in Philadelphia, RCN relied upon construction and installation contractors to deploy, operate, and maintain its competing infrastructure.[119] Comcast

116. *Id.* Appendix D ¶ 18.

117. *FCC NPR* ¶¶ 39; *see id.* ¶ 115 (noting findings in *Adelphia Order* that withholding of SportsNet in Philadelphia "has had a materially adverse effect on competition in the video distribution market").

118. J. Gregory Sidak & Hal J. Singer, *Vertical Foreclosure in Video Programming Markets: Implication for Cable Operators,* 3 REVIEW OF NETWORK ECONOMICS 348 (2007).

119. Third Amended Complaint, Caroline Behrend et al. v. Comcast Corporation et al., No. 03-6604 (E.D. Pa.), ¶91.

entered into and enforced non-compete clauses with its Philadelphia-area contractors.[120] Comcast also threatened its contractors with a loss of work in the event that they performed services for Comcast's competitors.[121] Comcast's conduct in the Philadelphia DMA has foreclosed overbuilders—most notably RCN—from access to contractors that can install and maintain a competitive wireline system. Altogether, RCN indicates that Comcast has prevented or attempted to prevent fifteen Philadelphia-area contractors from doing business with RCN.[122] According to RCN, these contractors represent "virtually all of the viable construction and installation contractors in the area."[123]

**b. Control over Local Franchise Authorities**

73. Comcast has successfully lobbied local franchise authorities ("LFAs") to delay or deny entry of MVPD rivals. Comcast's activities vis-à-vis RCN and Verizon in the Philadelphia DMA have been reported widely in the press. Comcast's ability to use LFAs as an entry barrier is evidence of Comcast's market power. Although such activities are protected as free speech, they reveal Comcast's market power (the ability to exclude rivals) and its anticompetitive intent.

74. RCN first attempted to enter Philadelphia in 1998. On June 8, 1998, the FCC announced that it was reviewing RCN's application to provide Open Video System (OVS) service to Philadelphia.[124] Established under the Cable Act of 1996, OVS operators are exempt from licensing and build-out requirements as long as they provide video transmission capacity to

120. *Id.*

121. *Id.*

122. *See, e.g.*, Petition of RCN Telecom Services, Inc., To Deny Applications or Condition Consent, Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, MB Docket No. 02-70 (FCC filed Apr. 29, 2002) at 17 ("RCN is aware of no less than fifteen (15) contractors in the Philadelphia market – representing virtually all of the viable construction and installation contractors in the area – whom Comcast or, prior to its acquisition by Comcast, Suburban Cable, have prevented or tried to prevent from doing business with RCN.").

123. *Id.*

124. *RCN Seeking Philly Market Entry From FCC*, MULTICHANNEL NEWS, Jun. 15, 1998.

any requesting unaffiliated programmers.[125] As an OVS applicant, RCN received similar treatment and assumed similar obligations.[126] At the conclusion of the statutory 10-day review of RCN's application, the FCC granted RCN approval to compete with cable operators in Philadelphia and the surrounding counties as an OVS operator.[127]

75. RCN planned to invest heavily in a new cable system in the Philadelphia DMA. On June 5, 1998, RCN filed an application with the FCC seeking to build and operate a 330-channel OVS system in 109 Philadelphia-area communities, including the City of Philadelphia.[128] The FCC approved this request on June 15, 1998.[129] On October 2, 1998, RCN filed another document with the FCC asserting its intent to build an OVS cable system covering the same 109 Pennsylvania communities listed in the FCC's *Order*.[130] In its initial build-out design, RCN planned to construct a $250 million system in the Northeastern and Northwestern sections of the City of Philadelphia.[131] In preparation for its entry into the Philadelphia DMA,

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125. *See* FCC, Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Order on Remand, CS Dkt. No. 96-46, rel. Nov. 19, 1999 (discussing the development of OVS licensing and adopting a modified OVS rule).

126. *Id.* Unaffiliated programmers would have been able to sign up for RCN's network as OVS programmers. *See also* Ted Hearn, *'Open Video Systems' A Turn Off*, MULTICHANNEL NEWS, Feb. 27, 2006.

127. *FCC OKs RCN in Philly, S.F.*, MULTICHANNEL NEWS, Jun. 22, 1998.

128. *See* RCN of Philadelphia, FCC OVS Application, undated, on file with author. *See also* In the Matter of RCN Telecom Services of Philadelphia, Inc, Certification to Operate an Open Vide System, Memorandum Opinion and Order, released June 15, 1998 [hereinafter *FCC Philadelphia OVS Decision*], at ¶ 1 ("On June 5, 1998, RCN Telecom Services of Philadelphia, Inc., a wholly owned subsidiary of RCN Corporation ("RCN"), filed an application for certification to operate an open video system pursuant to Section 653(a)(1) of the Communications Act of 1934 [...] and the Commission's rules. RCN-Philadelphia seeks to operate an open video system in the City of Philadelphia and in the Counties of Buck, Chester, Delaware, and Montgomery, Pennsylvania.").

129. *FCC Philadelphia OVS Decision, supra* at ¶ 12 ("Accordingly, IT IS ORDERED, that the certification application of RCN Telecom Services of Philadelphia, Inc. d/b/a RCN of Philadelphia to operate an open video system in the communities of: [109 Philadelphia-area communities listed].").

130. *See* In the Matter of RCN Telecom Services of Philadelphia, Inc., Notice of Intent to Establish an Open Video System, Oct. 2, 1998, on file with author.

131. *Princeton, N.J., Cable-TV Firm Withdraws Proposal for Philadelphia Network*, WORLD REPORTER, Feb. 15, 2001 [hereinafter *RCN Withdraws*].

RCN employees walked out 3,900 miles of fiber optic cable.[132] RCN also mapped and digitized more than 2,100 miles of the area and constructed a head end in neighboring Valley Forge.[133]

76. Despite obtaining approval from the FCC and from nine Philadelphia suburbs,[134] RCN could not obtain approval from the Philadelphia City Council to begin construction in the city proper. RCN began discussions with city authorities in approximately June 1998.[135] In contrast with the FCC, which reviewed RCN's application in ten days, the City of Philadelphia took an entire year just to produce an application for RCN to complete.[136] With the delay, RCN's application process took months longer to process than other cities.[137] Even after RCN obtained the necessary application documents, it faced delays imposed by the city administration. For example, Philadelphia Mayor Ed Rendell told RCN that approval would be unlikely before the end of 1999, which was already one and a half years after RCN initiated contact with the City.[138]

77. As it turns out, Comcast played a central role in pressuring City of Philadelphia officials to delay or deny RCN's entry into the Philadelphia market. Comcast's efforts are evident from statements made by city officials. For example, in May 1999 Mayor Rendell

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132. *RCN Begins Construction In Philadelphia, Company's Initial Progress Far Outpaces Early Development Of Prior Markets*, PR NEWSWIRE, Jul. 15, 1999.

133. *Id.* ("RCN is nearing completion of the high-tech operations center that will house the hardware necessary to sustain its bundled product offering in Philadelphia. Located in Valley Forge area, the facility will include a state-of-the-art data center, digital cable television head-end with a capacity of several hundred channels, and a Lucent 5-ESS telephone switch.").

134. *See RCN Begins Construction in Philadelphia, Company's Initial Progress Far Outpaces Early Development of Prior Markets*, July 15, 1999 ("The company has secured local licenses from nine communities in the region and has been granted federal Open Video System (OVS) approval to serve customers in the Philadelphia area. RCN's successful application to the FCC for OVS certification covers the Philadelphia metropolitan area and surrounding counties of Delaware, Bucks, Chester and Montgomery.").

135. *RCN Encounters A Tough Path, supra* ("RCN, founded by Bostonian David McCourt in 1997 and backed by billions from the likes of Microsoft Corp. cofounder Paul Allen, first approached Philadelphia in June 1998.").

136. *Id.* ("It took RCN a year just to get the city's negotiating team—officials from the Public Property and Law Departments—to generate and supply the elaborate application, many months longer than the process had taken in other cities.").

137. *Id.*

138. *Id.* ("At that May 1999 meeting, the mayor grew conciliatory after [RCN official John] Estey explained that under the federal Telecommunications Act of 1996, which encouraged cable competition, the city could not legally keep RCN out. 'If it is the federal law, then we have to follow it,' [mayor] Rendell said, adding that he doubted RCN had time to get approval before he would leave office seven months later.").